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LEGAL CAUSE IN ACTIONS OF TORT.

PROFESSOR JAMES B. THAYER has said that one office or problem of the courts, in laying down the law of evidence, is to determine when to exclude proof of facts which are really relevant.[1] Do not some courts, in laying down the rule of legal cause, proceed upon the supposition that one problem before them is to determine when to exempt a tortfeasor from liability for effects which were in reality caused by his tort?

Assume that the conduct of the defendant, either in the form of commission or of omission, was wrongful in law as against the plaintiff.

Assume also that the plaintiff has suffered damage of a kind which the law will notice and will afford redress for.

Then the problem is, whether the court will regard the defendant's conduct as the cause, in the legal sense, of the damage to the plaintiff, and will hold the defendant liable for such damage.[2]

This problem may be subdivided as follows:

1. Was defendant's tort in fact the cause of plaintiff's damage?
2. If so, is there any arbitrary rule of law absolving defendant from

[1] See Thayer, Preliminary Treatise on Evidence at the Common Law, 1, 4, 180, 264, 265, 266.

[2] "It is no ground of action that one person has done a wrong and another has suffered an injury, unless the latter is a product of the former. To sustain a suit, the two must be cause and effect." Bishop, Non-Contract Law, § 37.

liability for all, or any part of, the damage of which his tortious conduct was in fact the cause?

The question is not what philosophers or logicians will say is the cause. The question is what the courts will regard as the cause.

As to what is the cause of an event, philosophers and logicians may differ from jurists.[3] John Stuart Mill, in his work on Logic,[4] says, in substance, that the cause of an event is the sum of all the antecedents, and that we have no right to single out one antecedent and call that the cause. Whether from the standpoint of philosophy or logic Mr. Mill is right is a question which it does not concern us here to discuss. His view cannot be adopted as a working rule by courts. On that view no tortfeasor would be regarded as the cause of any damage. The practical question for a jurist is whether the tortious conduct of any human being has had such an operation in subjecting a plaintiff to damage as to make it just that the tortfeasor should be held liable to compensate the plaintiff.

"The lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause." [5]

If, for practical legal purposes, we reject the philosophic view of causation, and instead adopt the juristic view, it follows that the defendant's tort, in order to be regarded as the legal cause of the damage, need not be the sole cause, need not be the only causative antecedent.[6] Whether defendant's tort must be the predominant antecedent is a question to be considered later.

How shall the law define the term "legal cause" as used in reference to actions of tort? What is the legal test of the existence of causal relation?

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[3] ". . . the proximate cause of the law is not the proximate cause of the logician. . . ." See Henshaw, J., in Merrill *v.* Los Angeles Gas, etc. Co., 158 Cal. 499, 503, 111 Pac. 534, 536 (1910).

[4] Mill, Logic, 9 Eng. ed., 378–383.

[5] Pollock, Torts, 6 ed., 36. *Cf.* 1 Sutherland, Damages, 3 ed., § 16.

The difference between the philosopher and the jurist is well brought out in 4 Am. L. Rev. 211–214, by Mr. N. St. John Green, who was amply competent to view the subject from both standpoints. *Cf.* Prof. Bingham, 9 Col. L. Rev. 34, 35.

[6] For the construction given to the words "the direct and sole cause" in a policy of insurance, see Mardorf *v.* Accident Ins. Co., [1903] 1 K. B. 584.

As to these questions there is a remarkable conflict of authority. Several definitions or tests have some support, but there are strong reasons for holding that no one of them can be universally applied with satisfactory results. One or two of them may not even purport to cover all cases. Others may work justice in many cases but not in all.[7]

If, however, these tests are all rejected, the question comes, what shall be substituted. The answer given by some able jurists sounds like a counsel of despair. They appear to think that it is impossible to state a test. If this is so, it might seem to some lawyers undesirable to criticize and discard the tests hitherto commonly adopted. A bad test, consistently applied, would seem to some lawyers better than no test at all. General uncertainty might be thought a greater evil than the certainty of occasional injustice. It is often unadvisable to destroy a defective edifice until we are prepared to construct a better building in its place. Now we frankly admit that any test which we may hereafter suggest cannot be regarded as a finality, as an ultimate solution of all difficulties, as the last word to be uttered on the subject. At the utmost, it will be only a rough approximation to correctness, and it will be open to plausible objection on the ground of vagueness and indefiniteness. But it is believed possible to enunciate a general rule which, while open to some criticism, is less objectionable than any of the tests which have hitherto received strong support. Hence it seems expedient to consider the objections to these former tests.

As to tests or rules of causation which have hitherto been advocated, the present discussion will be concerned principally with the alleged rules which would make causal relation depend upon the probability or improbability of a certain result, *i. e.*, rules which would make the probability or improbability of a result the test of causal relation between the commission of defendant's tort and the happening of that result. It is to the consideration of these alleged tests that much of our space will be devoted.

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[7] "It is sometimes necessary in applying legal rules to do injustice to individuals; but where a rule [an alleged rule] of unwritten law is doubtful, the fact that its application is likely frequently to do injustice is a weighty argument against its existence. It becomes then necessary to show in its support either that it is upheld by precedents too many and clear to be questioned, or that on the whole it does conduce to justice and that it is not practicable to define or limit it in such a way as to avoid the hardship." Terry, Leading Principles of Anglo-American Law, § 354, p. 351.

But it seems desirable first to consider briefly other tests or rules which have been suggested; and see what, if any, objections can be urged against each of them.

The test or rule which is quoted in the law books more frequently than any other is what is called "Lord Bacon's maxim," accompanied by his comment thereon:

"*In jure non remota causa, sed proxima, spectatur.*"

"It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause; and judgeth of acts by that, without looking to any further degree." [8]

This maxim, with its gloss, is frequently cited as "an all-sufficient statement of the reasons for every decision upon a question of legal cause." Indeed the expression "proximate cause" is generally used instead of "legal cause," and it is often under the former head that one must look in digests for authorities on causation.

This use of the maxim as a universal solvent of difficulties has been productive of infinite confusion and error. Taking the words in their natural signification, the maxim is not a correct statement of the law.[9] Taken literally, the maxim would be understood as implying that the antecedent which is nearest in space or time is invariably to be regarded as the legal cause; and it might also be understood as putting material antecedents, forces of nature, on an equal footing with voluntary and responsible human actors. But it is a mistake to suppose that contiguity in space or nearness in time are legal tests of the existence of causal relation. No doubt these elements are often important to be considered in determining the question of fact as to the existence of such relation; but lack of contiguity or nearness would not, as matter of law, conclusively establish that the defendant's tort was not the cause of the damage.[10]

Bacon's language has repeatedly been criticized.

[8] Bacon's Maxims of the Law, Regula I.

[9] See, however, Professor Beale's "true reading of this maxim." 9 HARV. L. REV. 80, 81.

[10] Of course a defendant is not exonerated from liability for consequences merely because they are postponed. If a certain effect is traceable to the original injury, the author of that injury may be liable although the effect did not appear until after a

"'Remoteness' again is an utterly misleading and illogical term. It comes from the hazy and incorrect maxim, '*in jure proxima causa, non remota, spectatur*,' as elaborated by Sir Francis Bacon (Maxims of Law, Reg. I), in his continually quoted, but ridiculously unscientific comment, 'it were infinite to consider the impulsions of causes one upon another,' etc. It is just this which the law has to consider. It is not a question of remoteness and proximity, but of causation or non-causation." [11]

". . . proximate cause as a term to indicate the relation of legal cause and effect is a misnomer." [12]

"With reference to this maxim, nothing could be more misleading than to take it in its plain, primary sense; in that sense the law as often regards the 'remote' and disregards the 'proximate' cause, as it does the contrary." [13]

"If taken in what was apparently its original and literal meaning, that in case of doubt to which of two causes an injury or loss is to be assigned, you are to attribute it to that nearest in time or space, or which was in activity at the moment of the consummation of the injury or loss, the maxim is not only logically unsound, but opposed to the general current of the authorities. . . . . the reasonable inquiry, I submit, is not which is nearest in place or time, but whether one is not the efficient, producing cause, and the others but incidental." [14]

There is no "general test" of proximateness or remoteness. The terms are "always ambiguous." [15]

"It is certainly true that the court which follows strictly and without expansion the maxim *causa proxima, non remota, spectatur*, will go so far astray as to be unable to deal out justice to deserving suitors." It is the duty of the court "to ascertain and give effect to the spirit of the principle which the maxim dimly indicates but does not fully express." [16]

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considerable interval. See Bishop *v.* St. Paul City Ry., 48 Minn. 26, 50 N. W. 927 (1892), where plaintiff's paralysis, which did not develop until seven months after the accident, was found to have been caused by defendant's tort. See Alvey, C. J., in Sloan *v.* Edwards, 61 Md. 89, 99 (1883); 36 Am. St. Rep. 828, note; Purcell *v.* Lauer, 14 N. Y. App. Div. 33, 43 N. Y. Supp. 988 (1897).

[11] Bower, Code of the Law of Actionable Defamation, 315.

[12] 1 Street, Foundations of Legal Liability, 122.

[13] Bigelow on Torts, 7 ed., § 98.

[14] Thomas, J., dissenting opinion in Marble *v.* Worcester, 4 Gray (Mass.) 395, 406 (1855). See also Powers, J., in Marsh *v.* Great Northern Paper Co., 101 Me. 489, 502, 64 Atl. 844, 850 (1906); Marshall, J., in Deisenrieter *v.* Kraus-Merkel Melting Co., 97 Wis. 279, 284–285, 72 N. W. 735, 737 (1897); 1 Sedgwick, Damages, 9 ed., § 111 *d*.

[15] 1 Sedgwick, Damages, 9 ed., §§ 111 *b*, 112.

[16] Elliott, J., in Louisville, etc. Ry. Co. *v.* Nitsche, 126 Ind. 229, 238, 26 N. E. 51, 54 (1890).

". . . the word 'proximate' is unfortunately used, and seems often to mislead the inquirer, and to produce misapprehension of the real rule of law. That which is the *actual* cause of the loss, whether operating directly, or by putting intervening agencies — the operation of which could not be reasonably avoided — in motion, by which the loss is produced, is the cause to which such loss should be attributed." [17]

"It [Bacon's Maxim] is not intended to apply to a cause remote as regards distance, or remote in point of time, for so long as the loss is in the sequence of the antecedent, without other independent coöperating cause, neither distance nor time can affect the question." [18]

"The expression, indeed, remoteness is calculated to mislead, since a man may be held the cause of, and liable for, damage which may be a very remote consequence of his conduct, provided there be no intermediate cause to which it can be more properly referred." [19]

Another alleged test of the existence of causal relation is one which is occasionally found in instructions to juries, but is not likely to be sustained in a well-considered opinion of an appellate court. It is sometimes called "The But for Rule" or "But fc which Rule," and sometimes "The *Causa sine qua non* Rule."

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[17] Martin, C. J., in Brady *v.* Northwestern Ins. Co., 11 Mich. 425, 445 (1863).

[18] Guthrie Smith, Damages, 380.

[19] Dicey, Parties, 411.

As to the general subject, see also 4 Am. L. Rev. 210, 214; 9 Col. L. Rev. 144, note 20; 15 HARV. L. REV. 542–543; Terry, Leading Principles of Anglo-American Law, § 542; 33 Can. L. J. 713, 714; Willard, Law of Personal Rights, 235.

Various words and phrases used in reference to causation are criticised by Mr. Green in the following passage in 8 Am. L. Rev. 518–519:

"It is said that a recovery can be had for 'certain but not for uncertain damage'; for 'the proximate and natural consequences of the act complained of, but not for remote or consequential loss,' that 'the damage must arise naturally'; that 'it must be the fair, legal, and natural result of the act'; or, as Mr. Greenleaf expresses it (2 Greenl. Ev. 210), 'the damage to be recovered must always be the natural and proximate consequence of the act complained of.'"

"Now all these expressions are vague: they mean little; and in the majority of instances in which they are employed they probably mean nothing. No person who uses one of them, if asked what he means by it, can give a well-defined explanation. Such sentences are not a solution of a difficulty; they are stereotyped forms for gliding over a difficulty without explaining it. When a court say this damage is remote, it does not flow naturally, it is not proximate; all they mean, and all they can mean, is that under all the circumstances they think the plaintiff should not recover. They did not arrive at the conclusion of themselves by reasoning with those phrases, and by making use of them in their decision they do not render that decision clearer to others. The employment of such phrases has never solved one single difficulty. . . ."

This test or rule affirms that the defendant's tort is the legal cause of the plaintiff's damage if, but for the commission of defendant's tort, the damage would not have happened.

If this statement is turned round and put in a negative form, it can generally be applied as a test of what is *not* the cause of an event.

Generally speaking, a defendant is not liable, unless it be true that, but for his tortious act, the damage would not have happened. A defendant's tort cannot generally be considered the legal cause of plaintiff's damage, if that damage would have occurred just the same even though defendant's tort had never been committed.[20]

But it is a mistake to apply the "but for" rule affirmatively, as constituting a sole sufficient test of causation, as was done in the charge to the jury in Gilman *v.* Noyes.[21]

The "but for" requirement is generally one of the indispensable elements to make out legal cause. But it is not the only requisite element; it is not *per se* an all-sufficient element. The fact that the damage would not have happened, "but for" the commission of the defendant's tort, does not invariably justify the conclusion that the tort was the cause, in the legal sense, of the damage. At the present day, a *causa sine qua non* is not regarded as being necessarily the *causa causans*.[22] There is no absolute rule that defendant is the legal cause if there is a tortious act of his *anywhere* in the chain of antecedents, no matter how far back. The defendant's tort must be distinctly traceable as one of the substantial efficient antecedents; as having had a substantial share in subjecting plaintiff to the damage. A tort very remote in time or space may have practically spent its force and may not have been potentially oper-

[20] See Sowles *v.* Moore, 65 Vt. 322, 26 Atl. 629 (1893). The only exception we can think of is where two or more tortious causes are simultaneously operating, each being independent of the other, and each being alone sufficient to produce the damaging result; *e. g.*, X. and Y., each acting independently of the other, simultaneously shoot at B., and each hit him in a vital spot. B. is instantly killed; and each shot alone was sufficient to produce death. X. could not escape on the plea that the death would have resulted just the same if his tort had never been committed. See Watson, Damages for Personal Injuries, §§ 60–64, and § 43. See also Corey *v.* Havener, 182 Mass. 250, 65 N. E. 69 (1902).

[21] 57 N. H. 627 (1876).

[22] See Ladd, J., Gilman *v.* Noyes, 57 N. H. 627, 631–632 (1876). "The primitive conception of a sufficient legal cause was a *causa sine qua non*." Professor Bohlen in 21 HARV. L. REV. 234–235. At an early day the "but for" rule prevailed. 2 Pollock & Maitland, History of the Common Law, 2 ed., 470.

ative at the time of the harm; or its effect may have been infinitesimal.[23] To constitute the tortious conduct of a defendant the legal cause of the damage suffered by the plaintiff, "its connection must be something more than one of a series of antecedent events without which the injury would not have happened." [24]

Probably there are cases where no injustice would result, if the "but for" rule was given to the jury as the sole test of causative relation. Judge Ladd, whose opinion is always entitled to consideration, seems to have thought that Gilman *v.* Noyes was a case of this class.[25] But Judge Ladd, in the same opinion, explicitly denied that the "but for" rule could be universally applied as the sole test in determining the existence of causal relation.[26]

Another alleged test of the existence of causal relation is based upon the distinction between a cause and a condition.

But although we may reject Mr. Mill's view — that we have no right to give the name of cause to any one out of a number of antecedent conditions[27] — still the alleged distinction does not solve the question of the existence of causal relation. It is simply a restatement of the original problem in a different form of words.

"The distinction between cause and condition would be valuable, if there were any definite standard for determining what is a cause and what is a condition. The only standard by which this can be deter-

[23] It "has so far expended itself, that its influence in producing the injury is too minute for the law's notice." Bishop, Non-Contract Law, §§ 41, 44. And see 9 HARV. L. REV. 84, 85.

[24] Hart, J., Pittsburgh Reduction Co. *v.* Horton, 87 Ark. 576, 577, 113 S. W. 647, 648 (1908); Schoultz *v.* Eckhardt Mfg. Co., 112 La. 568, 36 So. 593 (1904); Gilman *v.* Noyes, 57 N. H. 627 (1876); Lord Dunedin, in Dunnigan *v.* Cavan & Lind Mfg. Co., 48 Scot. L. R. 459, 461 (1911).

[25] In Palmer *v.* Concord, 48 N. H. 211 (1868) the court practically held that the legislature intended to give this definition to the word "caused," as used in a certain statute.

[26] It is a mistake to regard the "but for" theory as exactly equivalent to the "theory of the logicians," as stated by Mill. It would seem that the theory of the logicians would render nobody liable. Mill says that all antecedents are equally causes, or rather parts of the cause (the cause being the sum of all the antecedents), and that we have no right to single out any one of them and call it the cause. The "but for" theory adopts Mill's premise; that all antecedents are, in one sense, causes; but, unlike Mill, says that plaintiff may single out any one tortious human antecedent and hold him liable.

[27] Mill, Logic, 9 Eng. ed., 378–383.

mined is the same as that which determines a proximate from a remote cause; . . . Accordingly, 'condition' or 'occasion,' while affording a convenient verbal distinction, is, in use, likely to mislead thinkers into a conviction that they have something which they have not." [28]

Pollock says: ". . . the contrast of 'cause' and 'condition' is dangerous to refine upon; . . ." [29]

There is an alleged rule, known as the "Last (or Nearest) Wrongdoer Rule," of which Dr. Wharton is an especial advocate.[30]

This rule is, in substance, as follows:

The legal cause is the last (or nearest) culpable human actor to be found in the chain of antecedents; *i. e.*, the one acting last before, or nearest to, the happening of the damage to plaintiff.

This rule is sometimes propounded, not as a supplement to the rule of liability for probable consequences; but as furnishing, *per se*, a complete and all-sufficient doctrine of legal cause.

Taking this rule literally, the test under it would be to trace back the links in the chain of antecedents,[31] until we come to a wrongful act of a responsible human being; to the last or nearest wrongful act of a free human agent. The person doing that act is the legal cause, (and *semble* is responsible even though the result could not have reasonably been anticipated).

The above rule is a good working rule to apply in a hurry. In a great majority of cases it gives the correct result. But it will not always do so.

1. The last wrongdoer is not always liable as the legal cause of the damage.

2. Moreover, the last wrongdoer, if himself liable, is not necessarily the only party liable. An earlier wrongdoer may sometimes be suable at the election of plaintiff.[32]

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[28] 1 Jaggard, Torts, 64.

[29] Pollock, Torts, 8 ed., 464, note *l*. See also 9 Col. L. Rev. 144, note 23.

[30] See Wharton, Negligence, 1 ed., Appendix, bottom paging 823, *et seq.*, also in text, §§ 85–99, and 134–145.

[31] See Mr. Green's criticism of the phrase "chain of causation," 4 Am. L. Rev. 211, 212.

[32] See Watson, Damages for Personal Injuries, § 74. When the damage results from the simultaneous concurrent acts of two independent wrongdoers, neither could escape on the ground that he was not the last wrongdoer.

As to the first point:

If the fault of the nearest wrongdoer is a very remote link in the chain of antecedents, he may not always be considered the legal cause of the damage. The force which he set in motion may be regarded as having become exhausted before the happening of the damage. It may no longer have been potentially operative at the time when the damage occurred; or its effect then may have been infinitesimal. It may have "so far expended itself, that its influence in producing the injury is too minute for the law's notice." [33] The defendant's tort, in order to constitute it a legal cause, must be distinctly traceable as one of the substantial efficient antecedents; as having had a substantial share in subjecting plaintiff to the damage.

This idea is expressed by Professor Beale in the following words:

"One at least of the factors of the act of injury must in a fair sense be due to the defendant. If the force he set in motion has become, so to speak, merged in the general forces which surround us, or in the language of Bishop has 'exhausted itself' like a spent cartridge, it can be followed no further. Any later combination of circumstances to which it may contribute in some degree is too remote from the defendant to be chargeable to him."

"Conceivably, of course, we might resolve every act of injury into its ultimate human forces, and charge each person who had set one of these forces in motion with his share of the act of injury. This would take us back to Adam in every case. Human knowledge is too small to perform such a task with justice, and time too short for the determination by this method of a single case. For their own protection, and for the security of the public at large, the courts refuse to go so far; beyond a certain point the operation of a force is called remote, and is disregarded." [34]

As to the second point (the possible liability of an earlier wrongdoer).

Suppose that there are two tortious human actors, A. and B., in the chain of antecedents, not acting in concert; that A.'s tort began earlier; and that B.'s tort, which began later, immediately preceded the happening of the damage to the innocent plaintiff and

[33] See Bishop, Non-Contract Law, §§ 41 and 44, and 2 Bishop, New Criminal Law, § 637.

[34] 9 HARV. L. REV. 84–85, and 85, note 2.

was the only force in active motion at the time of the damage. Is B. liable? Can the innocent plaintiff, in any conceivable case, have a right to sue A.?[35]

If B.'s tort had a substantial share in bringing about the damage, B., of course, cannot be exonerated on the ground that his tort was, in one sense, "caused" by the earlier tort of A.

But because B. is liable, it does not necessarily follow that A. is exonerated. By the decided weight of authority, A. would be liable if he foresaw,[36] or ought to have foreseen, the commission of B.'s tort, and the resultant damage, as a not unlikely consequence of his earlier tort. This subject will be more fully considered later under the general head of liability for probable consequences. And still later, in discussing the alleged rule of non-liability for improbable consequences, we may advert to the question whether A. may not sometimes be liable, even though the commission of B.'s tort was not a consequence to have been anticipated.[37]

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[35] In many cases it is not correct to speak of A. and B. as "successive" wrongdoers, nor to call A. "the earlier" or B. "the later" wrongdoer. See Clerk & Lindsell, Torts, 5 ed., 519, 522. But for present purposes we here adopt the popular phraseology, and use the words "earlier" and "later"; although A.'s tort, in its effect, may have continued down to the moment of the damage just as much as B.'s tort.

[36] If A., when committing his tort, foresees the probability that his tort will induce B. to do tortious damage to X., he is, from one point of view, more guilty than B. A. has done an act which he knew was calculated ultimately to bring harm to X., and also mediately to induce B. to do an unlawful act, whereby B. would incur liability. Why should A., who contemplates the likelihood of causing harm to two parties, X. and B., be excused when B., who contemplates harm to only one party, X., is held liable?

[37] What has been said concerns the question of causation when arising in litigation between an innocent plaintiff and one of two independent wrongdoers. But it should be carefully noted that, in a controversy between two negligent wrongdoers, courts are inclined to adopt an exceptional rule of legal cause; differing from the ordinary rule of legal cause which is applied in a suit by an innocent third party against either of said wrongdoers. The term "proximate cause" or "legal cause" is not used in precisely the same sense in fixing defendant's liability to an entirely innocent plaintiff and in fixing a negligent plaintiff's disability to sue a negligent defendant. (This language is based on a statement in Pollock, Torts, 8 ed., 464. See also Fitzgibbons, L. J., in Devlin *v.* Belfast Corporation, [1907] 2 I. R. 437, 457.) Acts of negligence on the part of A. and of B., which would be considered simultaneous (concurrent) in a suit brought against either of them by an innocent third person such as X., are sometimes in a controversy between A. and B. themselves considered not as simultaneous but as successive. One act is considered as ending before the other began; although logically (see Clerk & Lindsell, Torts, 5 ed., 519) the negligence of the "earlier" actor continued down to the moment of the damage. If the negligence of the plaintiff, A., has ceased to operate actively; and the negligence of the defendant B. began to operate later and was in active motion at the time of the damage; then, as between these two negligent parties, A. and B., the negligence of the defendant, B., may be treated as the sole cause

We come now to what is sometimes termed "The Probable Consequence Rule."

This really involves two rules.

The alleged rule, expressed in a single sentence, is that, so far as the question of causation is concerned, a wrongdoer is liable for probable consequences only.

This statement affirms, in effect, two propositions, which are entirely independent of each other.[38]

1. That if a consequence which actually resulted from defendant's tort was a probable consequence, then defendant cannot escape liability on the ground that his tort was not the legal cause.

2. That if a consequence which actually resulted from defendant's tort was an improbable consequence, then defendant is exonerated on the ground that his tort was not the legal cause.

The first, or affirmative, proposition is sustained in the great majority of cases.

The second, or negative, proposition is the subject of much controversy.[39]

These two alleged rules deserve separate and careful consideration.

The first alleged rule may be stated more fully as follows:

Whether a wrongdoer is or is not liable for improbable consequences, he must at least be liable, so far as the question of causation is concerned, for all probable consequences.[40]

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of the damage; and hence the action of the plaintiff A. against B. is not barred by contributory negligence.

But see the following criticism of the view last stated: "The above statements, moreover, are open to the objection that they seem to imply that, in the cases to which the qualification applies, there is a succession of negligences in point of time and that the party last negligent is the party really responsible; but it may be observed that if a man places his person or property in a position of danger, or establishes a state of things which is or may be dangerous to others, his negligence in so creating a source of danger to himself or others continues so long as that source of danger remains unremedied, that is to say, continues down to the very moment of the accident." Clerk & Lindsell, Torts, 5 ed., 519.

[38] Sometimes it is erroneously implied that the second proposition is a necessary deduction from, or accompaniment of, the first.

[39] "The criticisms of the rule apply rather to its alleged restrictive effect than to its affirmative form." It is sometimes "denied that liability should be confined" to probable consequences. Watson, Damages for Personal Injuries, 175.

[40] Under any reasonable interpretation, the term "probable consequences" excludes

Before trying to get at the exact meaning of the word "probable" in this connection, we must give a brief consideration to the compound phrase "probable and natural."

It is not unusual to say that a wrongdoer is liable for all probable *and natural* consequences.[41]

If "natural" is here used in the common, but not literally accurate, sense of "probable," then the phrase "liable for all probable and natural consequences" is tautological. If "probable" is taken to mean "foreseeable as not unlikely to occur," and "natural" is construed in its more literal signification, as meaning "occurring in the ordinary course of nature," then the addition of the requisite of naturalness to the requisite of probability might sometimes unjustly absolve a wrongdoer. In the great majority of instances the addition would make no difference. Generally if a result occurs which was probable, it occurs "in the ordinary course of nature." But it is conceivable that a wrongdoer may have foreseen, or ought to have foreseen, that there was likely to be an extraordinary departure from the usual course of nature. Indeed in some cases such an extraordinary departure is in actual and visible progress at the moment of his committing the tort. In such instances, a wrongdoer cannot claim to be exempted from liability for a probable consequence, merely because it did not occur in the ordinary course of nature.

Confusion is sometimes occasioned by lumping together "probable" and "natural" and treating them as synonymous words. Thus in Hill *v.* Winsor,[42] Colt, J., after saying that the probability that injury in some form would be caused by defendant's act "constitutes negligence, and it is not necessary that injury in the precise form in which it in fact resulted should have been foreseen," added: "It is enough that it now appears to have been a natural and probable consequence."

Upon this statement Professor Bohlen makes the following criticism:

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the requisite that the consequences must have been the necessary or inevitable result of the defendant's tort. See Watson, Damages for Personal Injuries, § 36.

[41] For various forms of expressing the meaning intended to be conveyed by the phrase "probable and natural consequences," see 36 Am. St. Rep. 809, note; Gaines, C. J., in Texas & Pacific Ry. Co. *v.* Bigham, 90 Tex. 223, 225, 38 S. W. 162, 163 (1896). As to "natural" see 1 Sedgwick, Damages, 9 ed., § 138.

[42] 118 Mass. 251, 259 (1875).

"Is it not a contradiction in terms to say that a thing so improbable that it could not be reasonably foreseen may become probable afterwards, because it does occur? It is natural, if it occurred in the ordinary course of nature, animate and inanimate, but it is not probable, unless it could have in advance been predicted as likely to occur." [43]

What is the exact meaning of the word "probable" as used in the alleged rule, *i. e.*, the rule that a wrongdoer is at least liable for all probable consequences.

We submit that the word "probable," when used in laying down a test of duty to use care or when used in the alleged rules affirming or restricting liability for the consequences of a tort, does not carry the full meaning belonging to it when used in charging a jury as to the *quantum* of proof. When the judge tells the jury that the plaintiff must satisfy them that the existence of an alleged fact is probable (that a certain proposition is probably true), he means that the jury must find that the chances (the balance of probabilities) are in favor of the existence of the disputed fact. If the jury find that the chances in favor of its existence are only three out of six (and *a fortiori* if only three out of seven), they must find against the party upon whom the burden of proof rests. But if the chances of harm resulting to plaintiff, in case certain precautions are not taken by defendant, are three out of seven, the jury would often be justified in finding the defendant negligent if he could have taken those precautions and failed to do so. So when the question is one of causal relation it is a mistake to use language [44] implying that a consequence in order to be "probable" must be "one that is more likely to follow its supposed cause than it is to fail to follow it." "Probable," both in testing the duty to use care and in the alleged rule as to causation, does not mean "more likely than not," but rather "not unlikely"; or, more definitely, "such a chance of harm as would induce a prudent man not to run the risk; such a chance of harmful result that a prudent man would foresee an appreciable risk that some harm would happen." [45] Mr. Watson substitutes "possible of occurrence" for the phrase "likely

[43] 40 Am. L. Reg. N. S. 85.

[44] See such language in Cole *v.* German Savings & Loan Soc., 124 Fed. 113, 115 (1903).

[45] See 33 Can. L. J. 717.

to occur." Shearman & Redfield use the words "reasonably possible" instead of "probable." [46]

Other suggestions have been made:

"Not so unnatural and so unlikely to happen that, in the opinion of a reasonable fair-minded man, it would be unjust to impose responsibility upon the defendant." [47]

"Not surprising in the light of average human experience." [48]

"'Probable,' as used in this connection, is a word of very indefinite import. Its range does not end where the chances of occurrence and non-occurrence are equal, but merges intangibly into the merely possible." [49]

"There is an infinity of intermedials between impossibility and certainty. To pass from one to the other, the probability may vary by an infinite number of gradations; and among a hundred assertions there are not perhaps two which represent the same degree of probability." [50]

The term "certainty" can mean nothing more than "a very high degree of probability." [51]

"Furthermore, 'probable' consequences include not only those concrete contingencies that are likely to happen, but also those not individually 'probable,' but belonging to a sort of which one or another, in the alternative, may be expected." [52]

"Damage may be very improbable in itself, and yet be only one of a large number of alternative forms of damage, one or other of which is certain or likely to happen; and in such a case all of these alternatives, by reason of the fact that they are alternatives, are sufficiently natural and probable to be a ground of liability. If I throw a stone into a crowd of a thousand persons, the chances are a thousand to one against hitting any particular individual, yet, in an action brought by one whom I did hit, I could not raise the defense of remoteness of damage." [53]

If the foregoing views are correct, a meaning which is too narrow has sometimes been given to the word "probable" when used in this connection. Giving greater effect (a wider scope) to the word "probable" in the affirmative rule, that a wrongdoer is liable at

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[46] Watson, Damages for Personal Injuries, § 33; 1 Shearman & Redfield, Negligence, 5 ed., 28.

[47] 33 Can. L. J. 717.

[48] 9 Col. L. Rev. 139.

[49] 9 Col. L. Rev. 139.

[50] Quetelet, Theory of Probabilities, Eng. ed. of 1849, 3.

[51] See De Morgan, Essay on Probabilities, London ed. of 1838, 5.

[52] Professor Bingham in 9 Col. L. Rev. 139, 140.

[53] Salmond, Torts, 2 ed., 109–110.

least for all probable consequences, will result in correspondingly lessening the scope and effect of the word "improbable" in the negative rule, that a wrongdoer is not liable for improbable consequences.

The rule that a wrongdoer is liable at least for all probable consequences has been sustained in the great majority of cases.

What, if any, exceptions have been claimed or allowed?

The New York courts made an arbitrary exception in case of the spread of fire. They said that there can be recovery only for the burning of the first building ignited; it makes no difference that the burning of the second building was a probable consequence of the burning of the first.[54]

This view is unsustainable on principle; and is opposed to an overwhelming weight of authority.[55]

It has been claimed that the rule — that a wrongdoer is liable for all probable consequences — does not apply to cases where a human actor (a third person) has intervened after the commencement of defendant's tortious act and before the happening of the damage to the plaintiff, and where the damage would not have occurred but for the intervention of such third person. Assuming even that the intervention of the third person could have been foreseen as a probable consequence of the defendant's tort, still it is contended that the defendant is not liable.

If the conduct of the intervener (the third person) was innocent, then his foreseeable non-tortious intervention does not necessarily absolve the defendant, who is, *ex hypothesi*, the only wrongdoer in the chain of antecedents. Innocent and foreseeable human intervention does not necessarily break the causal connection between defendant's tort and plaintiff's damage.[56]

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[54] Ryan *v.* New York Central R. Co., 35 N. Y. 210 (1866), somewhat modified in Hoffman *v.* King, 160 N. Y. 618, 630, 55 N. E. 401, 404 (1899).

[55] See Hoyt *v.* Jeffers, 30 Mich. 181 (1874); Lawrence, J., in Fent *v.* Toledo, etc. Ry. Co., 59 Ill. 349, 357–362 (1871); Milwaukee, etc. R. Co. *v.* Kellogg, 94 U. S. 469 (1876); 5 Ill. L. Rev. 579.

[56] See 2 Labatt, Master and Servant, § 808: "Non-culpable Acts of Responsible Actors." *Cf.* 33 Can. L. J. 720.

If the conduct of the human intervener was unlawful, but was foreseeable as a probable consequence of defendant's tort, there has been, and perhaps still is, some conflict of authority; but the later authorities are largely one way.

Suppose that there are two "tortious" human actors, A. and B., in the chain of antecedents, not acting in concert; that A.'s tort began earlier; that B.'s tort, which began later, immediately preceded the happening of the damage to the plaintiff and was the only force in active motion at the time of damage; but that the commission of B.'s tort could have been foreseen as a probable consequence of the commission of A.'s tort. Is A. liable, or is the plaintiff confined to a remedy against B.? [57]

Three classes of cases may arise which differ as to the nature of the unlawful conduct on the part of the intervener.

1. The fault may consist in his breaking a contract which he had made with the plaintiff.[58]

2. The fault may consist in negligent conduct on his part toward the plaintiff.

3. The fault may consist in wilful and consciously wrong conduct on his part toward the plaintiff.

Formerly it would have been held by some courts that the so-called "earlier" tortfeasor was never liable in any of the above three cases, and for this view Vicars *v.* Wilcocks [59] is the leading authority.

Two grounds are taken:

The first ground is suggested by the trial judge in Vicars *v.* Wilcocks, namely, that plaintiff has a remedy against the intervener (in that instance, an action on the contract to recover damages for his employer's breach of contract); *i. e.*, the fact that plaintiff has a remedy against the "later" actor constitutes a sufficient reason for denying him a remedy against the "earlier" actor.

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[57] In many cases it would not be correct to speak of A. and B. as "successive" wrongdoers, nor to call A. "the earlier" or B. "the later" wrongdoer. See Clerk & Lindsell, Torts, 5 ed., 519, 522. But these terms are commonly used.

[58] "To break a contract is an unlawful act." "A breach of contract is, in itself, a legal wrong." "The form of action for such a wrong is quite immaterial in considering the general question of the legality or illegality of a breach of contract." See Lord Lindley in Glamorgan Coal Co. *v.* South Wales Miners' Federation, [1905] A. C. 239, 253.

[59] 8 East 1 (1806).

This position is untenable.

"Where it is a question whether A. has been injured by B., it is wholly immaterial whether he has or has not an additional or alternative remedy against C., and it can never lie in the mouth of a wrongdoer, if he *is* a wrongdoer, to set this up." [60]

The second, and principal, ground consists in laying down an arbitrary rule of law, founded on an assumption which in many cases is "contrary to manifest truth and fact." There was a tendency to hold that the subsequent voluntary unlawful act of a third person "could not in law, under any circumstances," be deemed the consequence of the tort of an earlier wrongdoer. Another way of expressing this view would be to say that there is a conclusive presumption of law that the earlier tort did not cause the later tort and was not a substantial factor in causing the resultant damage. Damage thus resulting would not be the "legal" consequence of the earlier tort. Hence an earlier tortfeasor could never be liable for damage of which the immediate cause was the later unlawful act of a third person. And this view was maintained irrespective of the question whether the subsequent unlawful act of the third person was or was not a consequence which might have been reasonably anticipated as not unlikely to follow from the commission of the earlier tort, and also irrespective of the question whether the third person's act was or was not induced, directly or indirectly, by the defendant's act.

This view has been crumbling away.[61] It has been pointed out that if the law is to imply in every case that the subsequent voluntary unlawful act of the third party is not the natural and probable result of the earlier tort, "it will be an implication contrary to manifest truth and fact."

"If that were so held in all cases, the law would in some refuse to recognize what is manifestly true in fact." [62]

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[60] Bower, Code of the Law of Actionable Defamation, 315.

[61] The modern conception is, "that everything, which is, in fact, likely to occur, is legally foreseeable." Professor Bohlen in 56 Univ. Pa. L. Rev. 331, note 79.

[62] See Brett, L. J., in Bowen *v.* Hall, 6 Q. B. D. 333, 338 (1881); Pollock, Torts, 8 ed., 242–243, and 330–331. Also the full discussion in Bower, Code of the Law of Actionable Defamation, 313–315, and 39, note *d*. See also Watson, Damages for Personal Injuries, § 74.

It gradually came to be admitted that the earlier tortfeasor is liable in cases where the commission of the subsequent unlawful or tortious act and the happening of the damage ought to have been foreseen by him as not unlikely to follow. But liability, even in the case of a foreseeable result, was not established without an attempt at an illogical limitation; namely, that liability attached only where the later tort was negligent, and not where it was wilful. A subsequent act of negligence was "supposed to be within the range of reasonable expectation," while intentional misconduct never could be deemed possible.[63] This doctrine has been termed a "curious tribute to virtue." [64] But no such limitation can be reasonably imposed as an arbitrary legal test. Undoubtedly wilful misconduct on the part of third persons is not to be anticipated so often as negligent misconduct. But "in exceptional situations even wilfully wrongful acts of others are normal and expectable." [65]

"It cannot be laid down, as a matter of law, that damage caused by the wilful wrongdoing of a third person can never be the natural and probable result of a wrongful act done by the defendant." [66]

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[63] See Watson *v.* Kentucky & Indiana Bridge & Ry. Co., 137 Ky. 619, 633, 126 S. W. 146, 151 (1910); Mars *v.* The President, Managers and Co. of the Delaware, etc. Co., 54 Hun (N. Y.) 625, 8 N. Y. Supp. 107 (1889).

[64] See Mr. Labatt, in 33 Can. L. J. 719. *Cf.* Holmes, L. J., in Sullivan *v.* Creed, [1904] 2 I. R. 317, 356.

[65] Professor Bohlen in 21 HARV. L. REV. 236, note 2. *Cf.* Lord Wensleydale, in Lynch *v.* Knight, 9 H. L. Cas. 577, 600 (1861).

[66] Salmond, Torts, 2 ed., 114.

In a recent opinion the "illogical limitation" we have been commenting upon is attempted to be supported upon substantially the following ground:

The mere negligence of A. and the wilful violence of B., not being wrongs of the same legal nature or on the same legal level, *cannot* contribute so as to become the one proximate cause of injury to a third person. They are incompatible as joint and contributory elements in one and the same proximate cause of an injury. The interposition of the wilful violence is *necessarily* the intervention of a new and independent force, which breaks the causal connection between the negligence and the injury. See Chytraus, J., in Milostan *v.* City of Chicago, 148 Ill. App. 540, 544, 545 (1909) (a case where the wilful violence of B. was not a probable result of the negligence of A.).

For an unconscious *reductio ad absurdum* of the theory that the wilful tort of a "later" wrongdoer always breaks the causal connection between the fault of an "earlier" wrongdoer and the harm to the plaintiff, see the extraordinary *dicta* in Ross *v.* Western Union Tel. Co., 81 Fed. 676, 677–678 (1897). That was an action under a death statute, where it was alleged that the Telegraph Company negligently delayed delivering a message warning the addressee that armed men were in pursuit of him; and that, in consequence of this delay, he was overtaken and killed by the pursuers. The actual decision in favor of defendant is based on the ground that the Telegraph Company

As we have already said, the view that the earlier wrongdoer can never be liable, not even in case of foreseeability of the tort of the later wrongdoer, is rapidly disappearing. It is, however, to be noted that, while it is not likely that the older doctrine will often be directly reaffirmed by modern courts, yet some modern judges are (unconsciously perhaps) influenced by the old phraseology, and by the exploded arguments in favor of the former view. It is thus only that one can account for the results reached in some modern cases, and for the great reluctance to submit to a jury the question of foreseeability.[67] Professor Bohlen says that

"the rule of Vicars *v.* Wilcocks, 8 East 1, still occasionally crops up as a refuge to a court wishing in a hard case to relieve some unfortunate rather than morally wrongful delinquent from the extreme burden of full liability for all the actually proximate results." [68]

The old view that the earlier wrongdoer can never be liable persists in only one class of cases. The original utterer of defama-

was not negligent as to the delivery of the message. But the court seem also to take the position that the defendant should be absolved because an entirely new and independent cause, the wilful shooting by the pursuers, intervened to bring about the fatal result. This view overlooks the fact that the danger that the wilful shooting might occur was apparent to the company from the message itself; and was the very danger as to which the message was intended to put the addressee on his guard. The shooting was foreseeable as a not unlikely result of the failure to make prompt delivery. An agency which exists to the knowledge of the defendant at the time of his tort is not such an "intervening" agency as to break causal connection. To have this effect, "it must either come into existence, or [come] within the knowledge of the defendant after the time the [defendant's] alleged negligent act or omission took place." Professor Bohlen in 40 Am. L. Reg. N. S. 162.

[67] See, for instance, Hullinger *v.* Worrell, 83 Ill. 220 (1876); Henderson *v.* Dade Coal Co., 100 Ga. 568, 28 S. E. 251 (1897); Andrews *v.* Kinsel, 114 Ga. 390, 40 S. E. 300 (1901).

[68] 21 HARV. L. REV. 236, note 2.

"The fact that a third person's wrong contributed to the injury usually does not affect the liability of the wrongdoer. Most of the apparent exceptions to this rule will, I think, be found to depend upon another principle, namely, that in ordinary circumstances one is justified in assuming that others will conduct themselves according to the dictates not only of law, but of morality, justice and reasonableness, and therefore any conduct that is proper on that assumption will not be turned into a wrong by their subsequent failure to do so. The question will not be one of proximateness of consequences at all, because there will have been no breach of duty . . . But if the circumstances are such as to make it probable that in the particular case others will not act rightly, then the original conduct may be wrongful and the wrongdoer be responsible for consequences happening through such contributory wrong of others." Terry, Leading Principles of Anglo-American Law, § 563.

tion is still held not liable for special damage immediately due to repetition by a third person. But this view is supported solely upon authority; being totally indefensible upon principle.[69]

Thus far we have been dealing with the alleged rule that, so far as the question of causation is concerned, a wrongdoer is at least liable for probable consequences.

Now we come to the alleged rule, briefly stated as the rule of non-liability for improbable consequences. A fuller statement, according to our construction of the rule, would be —

that if a consequence which actually resulted from defendant's tort was an improbable consequence, then defendant is exonerated on the ground that his tort was not the legal cause.

This alleged rule is to be considered both as to authority and as to intrinsic correctness.

As to authority.

Many lawyers suppose that the alleged rule, as to non-liability for improbable consequences, is supported by so many decisions that it is now too late to question its intrinsic correctness. But the weight of authority is overestimated. The alleged rule has undoubtedly been enunciated in many cases by reputable judges. But a very large number of these cases cannot be reckoned as actual decisions in point.

First: In a large proportion of these cases the judicial utterances are pure *dicta*. The consequence was probable; *i. e.*, foreseeable as a not unlikely result. Hence the question of liability for improbable consequences was not before the court for decision.[70]

Second: In some cases where the court has exonerated the defendant upon the ground that the causal relation did not exist

[69] See Mr. Labatt in 33 Can. L. J. 717; Terry, Leading Principles of Anglo-American Law, § 563; Bower, Code of the Law of Actionable Defamation, 302–303, 38, 39 note *d*; 36 Am. St. Rep. 844, note.

[70] Cases may also be found where the defendant's remote tort was not distinctly traceable as an efficient factor at the time of the happening of the damage. Hence, there was no occasion to decide whether he should be exonerated on the ground that the consequence was an improbable result.

the decision might better have been based upon the ground that the defendant had not committed any tort, as against the plaintiff. There was no duty due, or no breach of any duty, from the defendant to the plaintiff, and therefore no tort. Hence there was no occasion to discuss the subject of legal cause (the relation between the defendant's conduct and plaintiff's damage). The question as to the causative effect of a particular act is entirely distinct from the question of the tortious nature of the same act.[71] In some instances, a defendant might properly be exonerated on the ground that he owed no duty to the plaintiff as to the conduct in question; but if he had owed a duty, he might not justly claim to have his liability limited to foreseeable consequences.[72]

The defendant may have committed a tort as against a third person; but he may not have violated any duty which he owed to the plaintiff. Suppose that, in such a case, the plaintiff sues for alleged negligence. A decision in favor of the defendant is explainable on the following ground:

"It is not that the injurious act [the damage suffered] is a remote consequence of a wrong done, as is usually said, that the doer escapes, but because in a question with the [alleged] injured party, there has been no negligence. An act is not negligent in itself, but only in respect that it is likely to cause injurious consequences to some determinate person, or one of a determinate class of persons, and an act which is negligent with relation to one person may not be so in relation to another person who is also injured by it." [73]

Again, the defendant may have owed a duty to the plaintiff, and he may have violated that duty, and the plaintiff may have suffered particular damage. Yet the prevention of the particular consequence of which complaint is made may not have been within the scope of the duty which the defendant has infringed; and, if so,

[71] See Professor Bohlen's Selection of Cases on Torts, Book 2, page 74, note 2; Terry, Leading Principles of Anglo-American Law, § 409, page 399.

[72] See Terry, Leading Principles of Anglo-American Law, § 543, pages 548, 549; Professor Bohlen in 40 Am. L. Reg. N. S. 151, 157, note; 1 Beven, Negligence, 2 ed., 108.

[73] Glegg, Reparation, 34, 35. See also Terry, Leading Principles of Anglo-American Law, § 533. Mr. Glegg here refers to Renner *v.* Canfield, 36 Minn. 90, 30 N. W. 435 (1886), and Phillips *v.* Dickerson, 85 Ill. 11 (1877), which are sometimes cited as bearing on causation. The real *ratio decidendi* in both cases would seem to be, that the defendant had not committed any tort as against the plaintiff. See also 1 Sedgwick, Damages, 9 ed., § 120.

the defendant is not regarded as having tortiously caused that particular damage, and hence is not held liable for it.[74] The defense here suggested does not raise a "question of remoteness of consequence, but a question of definition of duty." The defendant does not escape upon the ground that his conduct did not sustain a causal relation to plaintiff's damage, but upon the ground that the prevention of that particular kind of damage "is not within the limits of any duty that defendant has infringed."[75]

Third: There are some opinions which "betray a confusion of the principles of 'legal cause' with those underlying the requirements concerning certainty of proof. . . ."[76] Suppose that plaintiff has failed to make out by preponderance of evidence that defendant's tort was, in fact, the cause of plaintiff's damage.[77] Then the case should be decided on the short ground that plaintiff has failed to establish the existence of causal relation; and there is no occasion for the court to say whether, if that relation had been made out, they would nevertheless have denied recovery on the ground that the damage, even though it actually resulted, was improbable. Yet cases of this sort may be found where the court appear to base the decision upon the alleged rule that the improba-

[74] "If a statutory duty be imposed solely in order to prevent damage of one particular kind, no action will lie for such breach of it as only causes damage of a different kind." Headnote in Kenny's Cases on Torts, 15, to the case of Gorris *v.* Scott, L. R. 9 Exch. 125 (1874).

[75] See 9 Col. L. Rev. 26, 27, 34, 35, 154; Terry, Leading Principles of Anglo-American Law, § 528. This view is very clearly stated in Professor Bingham's two articles in 9 Col. L. Rev. 16, 136, entitled "Some Suggestions concerning 'Legal Cause' at Common Law."

[76] 9 Col. L. Rev. 36.

[77] As to the *quantum* of proof required, it has been said that the consequence must be traceable to the defendant's act "with reasonable certainty," or "with sufficient certainty." See Terry, Leading Principles of Anglo-American Law, §§ 410, 551, 352, 550, 355. What constitutes "reasonable certainty" or "sufficient certainty" of causal connection between defendant's tort and plaintiff's damage? We submit that it is sufficient if the jury find, upon reasonable grounds, that it is more probable than otherwise that the defendant's tort caused the plaintiff's damage. See Parsons, C. J., in Boucher *v.* Larochelle, 74 N. H. 433, 434, 68 Atl. 870, 871 (1908). Suppose that A. sues B., alleging that B. struck him, and that the wound resulted in blood poisoning. To prevail on the issue as to the striking of the blow, A. has only to prove his case on the balance of probabilities. Why should any higher degree of certainty, or larger quantity of proof, be required on the issue as to the consequences resulting from the blow? In Allison *v.* Chandler, 11 Mich. 542, 555 (1863), Christiancy, J., said: ". . . we can see no good reason for requiring any higher degree of certainty in respect to the amount of damages, than in respect to any other branch of the cause."

bility of a consequence bars recovery for any damage, even though it was actually caused by defendant's tort. Certainly such opinions ought not to be counted as authorities in favor of the alleged rule.

"Whenever a requisite to maintenance of a plaintiff's claim or any part of it cannot be established with sufficient certainty, the plaintiff fails *pro tanto;* but because of the principles concerning certainty of proof, not because of any principle of proximate cause."

It is only when "the connection of cause and consequence has been established," as matter of fact, that the court can be called upon to consider whether they should adopt a rule arbitrarily limiting recovery.[78]

The "confusion" above referred to is illustrated by a passage in Professor E. C. Clark's Analysis of Criminal Liability,[79] in which that able writer gives the following as an instance of "over-remoteness":

"Evidence was too slight to convict for manslaughter, where the prisoner had struck a light and lighted a candle, contrary to ship's regulations, and thrown down the lighted match, but six hours elapsed without sign of fire by sight or smell: . . ." [80]

But the decision referred to does not proceed upon the ground that the defendant's act was too remote an antecedent. It is based on the ground that there was not sufficient evidence to show that it was a causative antecedent at all. It is not a case of a cause too far removed, a cause having too little effect; but a case where plaintiff failed to prove defendant's act to be a cause at all.

Fourth: Many cases, where the opinion seems to favor non-liability for improbable consequences, are actions for breach of contract. But cases laying down a restrictive rule of legal cause in actions for breach of contract are not necessarily authorities for a similar limitation of liability in actions of tort.

The better view is that there is, in this respect, a material distinction between these two classes of actions. In contracts, the relation is entered into voluntarily; the plaintiff selected the person with whom to make his agreement; he could have refused to

[78] See 9 Col. L. Rev. 36, note 39; Terry, Leading Principles of Anglo-American Law, § 550.

[79] On p. 17, note 22.

[80] Referring to 1 Russell, Crimes and Misdemeanors, 841, which cites Regina *v.* Gardner, 1 Fost. & Finl. 669 (1859).

enter into the relation at all unless there was a satisfactory stipulation as to damages in event of non-performance; or he could call to the other party's attention certain facts rendering it probable that certain special damages would result from non-performance. In view of these considerations, the courts are inclined to restrict the damages to such as were within the contemplation of the parties (or better, "such consequences as the parties, if they had looked forward to the consequences of non-performance, would have contemplated as likely to follow").

The case of a tort differs widely. Here the relation is not entered into voluntarily. The plaintiff has no chance to stipulate as to damages recoverable; nor has he generally an opportunity to give notice, before the commission of the tort, of any special circumstances likely to enhance the damages.[81]

But even though we leave out of consideration the foregoing classes of cases, there remains a good deal of authority in favor of the alleged rule of non-liability for improbable consequences. There are many cases where this rule has furnished the basis of decision, but frequently without any examination of its intrinsic correctness; instances of "law taken for granted." The decisions, however, are by no means unanimous. There are not wanting cases where the courts squarely reject the alleged rule. The leading English case in this direction is Smith *v.* London & S. W. R. Co.[82] As leading American cases to the same effect, we may cite Christianson *v.* Chicago, etc. Ry. Co.,[83] Stevens *v.* Dudley,[84] and Isham *v.* Dow.[58] There is also the earlier and very able opinion of Wardlaw, J., in Harrison *v.* Berkley,[86] where, however, the actual decision did not turn upon this point.

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[81] As to these distinctions, see Professor Bohlen in 40 Am. L. Reg. N. S. 80–82; Terry, Leading Principles of Anglo-American Law, § 552, and see also §§ 553, 554; Innes, Torts, Pref. xii, xiii; Christiancy, J., in Allison *v.* Chandler, 11 Mich. 542, 551, 555 (1863); 1 Beven, Negligence, 3 ed., 105, 106; Pigott, Torts, 164; 1 Sedgwick, Damages, 9 ed., § 141.

[82] L. R. 6 C. P. 14 (1870).

[83] 67 Minn. 94, 69 N. W. 640 (1896).

[84] 56 Vt. 158 (1883).

[85] 70 Vt. 588, 41 Atl. 585 (1898). And see Earl, J., in Ehrgott *v.* Mayor of New York, 96 N. Y. 264, 280, 281 (1884).

[86] 1 Strob. L. (S. C.) 525, 548–549 (1847).

Among legal authors there is a division of opinion.

The alleged rule is sustained by the high authority of Pollock, Cooley, and Salmond; but Salmond's support seems to be given only in deference to the supposed weight of authority.[87] This rule "reasonably stated and reasonably applied" is adopted by Mr. Watson in his Damages for Personal Injuries.[88]

On the other hand, the rule is opposed by Beven, Bohlen, and Street, in passages to be referred to hereafter. It is also opposed in the second edition of Mr. A. G. Sedgwick's Elements of the Law of Damages,[89] and in the forthcoming ninth edition of Sedgwick on Damages.[90]

Upon the question what the law *ought to be*, the opinion of codifiers is entitled to consideration. The Civil Code of California, § 3333, contains the following provision:

"For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." [91]

In this connection attention may be called to the judicial interpretation of such words as "results," "causes," and "produces," in statutes imposing absolute liability irrespective of fault; or imposing liability for violation of a duty imposed by statute. It has in various instances been held that such general words include improbable consequences; *i. e.*, the defendant is liable if damage in fact resulted; irrespective of the question whether such result might have been reasonably anticipated.

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[*To be continued.*]

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[87] See Pollock, Torts, 8 ed., 32; Cooley, Torts, 2 ed., 74, note 1; Salmond, Torts, 2 ed., 105.

[88] At p. 174. Judge Jaggard, 1 Torts, 372, thinks that the American courts have not determined very definitely as to this test. Professor Dicey says: "The principle that a person is not liable for results which do not flow naturally from his acts, must be applied with great caution." Dicey, Parties, 411.

[89] At p. 50.

[90] Vol. I. §§ 111 *c* and 111 *e*.

[91] Cal. Civ. Code, Deering's ed. (1886). See also §§ 1427, 1428, 1708, 1714. Contrast § 3300 as to damages for breach of contract.